

Letter of Findings: 04-20150144
Gross Retail Tax
For the Years 2011, 2012, and 2013

NOTICE: IC § 6-8.1-3-3.5 and IC § 4-22-7-7 require the publication of this document in the Indiana Register. This document provides the general public with information about the Department's official position concerning a specific set of facts and issues. This document is effective on its date of publication and remains in effect until the date it is superseded or deleted by the publication of another document in the Indiana Register. The "Holding" section of this document is provided for the convenience of the reader and is not part of the analysis contained in this Letter of Findings.

HOLDING

Indiana optometry business was entitled to an adjustment of an audit assessment of sales tax on purchases made from two vendors; the business was able to provide documentation establishing that it paid tax at the time of the original sales transactions.

ISSUE

I. Gross Retail Tax - Additional Documentation.

Authority: IC § 6-2.5-1-2; IC § 6-2.5-1-24; IC § 6-2.5-1-27; IC § 6-2.5-2-1; IC § 6-2.5-3-2; IC § 6-2.5-3-4; IC § 6-2-5-4-1; IC § 6-2.5-5-1 et seq.; IC § 6-8.1-5-1(c); Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579 (Ind. 2014); Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289 (Ind. Tax Ct. 2007); [45 IAC 2.2-3-4](#); [45 IAC 2.2-4-3\(a\)](#); Sales Tax Information Bulletin 48 (July 2013).

Taxpayer argues that it has supplied additional documentation not available at the time of the original sales and use tax audit and that the assessment should be modified to reflect that additional information.

STATEMENT OF FACTS

Taxpayer is an Indiana company in the business of providing optometry services to its patients. Taxpayer provides eye cataract evaluation to determine if the patients are eligible for surgery. If surgery is indicated, the patients return to Taxpayer for post-surgery and recovery treatment.

The Indiana Department of Revenue ("Department") conducted a sales and use tax audit and reviewed Taxpayer's tax returns and business records. The audit resulted in the assessment of additional tax. Taxpayer disagreed with a portion of the assessment and submitted a protest to that effect. An administrative hearing was conducted by telephone during which Taxpayer's representative explained the basis for the protest. This Letter of Findings results.

I. Gross Retail Tax - Additional Documentation.

DISCUSSION

The issue is whether Taxpayer's supplemental documentation establishes that it paid sales tax on certain items and the audit assessment should be adjusted to reflect those previous tax payments.

As a threshold issue, it is the Taxpayer's responsibility to establish that the existing tax assessment is incorrect. As stated in IC § 6-8.1-5-1(c), "The notice of proposed assessment is prima facie evidence that the department's claim for the unpaid tax is valid. The burden of proving that the proposed assessment is wrong rests with the person against whom the proposed assessment is made." Indiana Dep't of State Revenue v. Rent-A-Center East, Inc., 963 N.E.2d 463, 466 (Ind. 2012); Lafayette Square Amoco, Inc. v. Indiana Dep't of State Revenue, 867 N.E.2d 289, 292 (Ind. Tax Ct. 2007). Consequently, a taxpayer is required to provide documentation explaining and supporting his or her challenge that the Department's position is wrong. Further, "[W]hen [courts] examine a statute that an agency is 'charged with enforcing . . . [courts] defer to the agency's reasonable interpretation of [the] statute even over an equally reasonable interpretation by another party.'" Dept. of State Revenue v. Caterpillar, Inc., 15 N.E.3d 579, 583 (Ind. 2014). Thus, interpretations of Indiana tax law contained within this

decision, as well as the preceding audit, are entitled to deference.

Pursuant to IC § 6-2.5-2-1, a sales tax, known as state gross retail tax, is imposed on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-5-1 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1. A complementary excise tax, known as the use tax, is imposed on the storage, use, or consumption of tangible personal property in Indiana if the property was acquired in a retail transaction. IC § 6-2.5-3-2. An exemption from the use tax is granted for transactions where the sales tax was paid at the time of purchase pursuant to IC § 6-2.5-3-4 and [45 IAC 2.2-3-4](#).

The audit found that Taxpayer had failed to pay sales tax on the purchase of certain items, that the purchases were not exempt from tax, and that Taxpayer was now responsible for that tax.

As authority for that decision, the audit cited to [45 IAC 2.2-3-4](#).

Tangible personal property, purchased in Indiana, or elsewhere in a retail transaction, and stored, used, or otherwise consumed in Indiana is subject to Indiana use tax for such property, unless the Indiana state gross retail tax has been collected at the point of purchase.

The audit cited to Sales Tax Information Bulletin 48 (July 2013) (20130028 Ind. Reg. 045130397NRA) for the proposition that Taxpayer was responsible for the tax if and when the tax was not collected by the original vendor.

If the purchase of taxable items by the practitioner is made where sales tax is not charged, the practitioner becomes liable for the use tax and must remit it directly to the Department of Revenue.

Taxpayer provided documentation for transactions entered into a vendor called D2P LLC. The documentation establishes that Taxpayer paid \$3,509.24 in sales tax on purchases from that vendor. To the extent that the audit assessed tax on purchases from D2P LLC, the assessment should be adjusted to reflect the amount of tax previously paid. However the information notes that tax was not paid on the freight charges. IC § 6-2.5-4-1(e)(2) provides in part that separately stated delivery charges are considered part of selling at retail and subject to sales and use tax. D2P LLC should have charged sales tax on the delivery charges, and Taxpayer is now responsible for paying that amount.

Taxpayer provided documentation for transactions entered into with a vendor called Superior Carpet Installers, Inc. To the extent the audit assessed tax on purchases from that vendor, the assessment should be adjusted to reflect the amount of tax previously paid. However, as noted previously, Taxpayer is responsible for paying sales tax on the delivery charges.

Taxpayer provided documentation for transactions entered into with a vendor called Taylored Systems, Inc. However, the documentation establishes that tax was not collected for sales transactions with this company and no adjustment is warranted.

Taxpayer provided documentation for a transaction with a company called PC Help Services. The invoice indicates that the Taxpayer paid for a "Software Development Project."

As noted above IC § 6-2.5-2-1 imposes a sales tax, known as state gross retail tax on retail transactions made in Indiana unless a valid exemption is applicable. IC § 6-2.5-5-1 et seq. Retail transactions involve the transfer of tangible personal property. IC § 6-2.5-1-2; IC § 6-2.5-4-1.

IC § 6-2.5-1-27 specifies that:

"Tangible personal property" means personal property that:

- (1) Can be seen, weighed, measured, felt or touched; or
- (2) Is in any other manner perceptible to the senses.

The term includes electricity, water gas, steam, and prewritten computer software. (Emphasis added).

"Prewritten computer software" is defined in IC § 6-2.5-1-24 which provides in part as follows:

Subject to the following provisions, "prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser:

- (1) The combining of two (2) or more prewritten computer software programs or prewritten parts of the

programs does not cause the combination to be other than prewritten computer software.

The "PC Help Services" is not sufficient to establish that Taxpayer bought services or whether it purchased prewritten computer software. As required by IC § 6-8.1-5-1(c), Taxpayer has not established that this particular portion of the assessment was "wrong" and it is not possible to adjust the original assessment based on this particular information.

As described above, Taxpayer's protest is sustained to the extent that Taxpayer is entitled to a "credit" or offset against the original assessment for taxes previously paid its two vendors.

FINDING

Taxpayer's protest is sustained in part and denied in part.

Posted: 07/29/2015 by Legislative Services Agency

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